85-964

Supreme Court, U.S.
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NO.

In The

Supreme Court of the United States

October Term, 1985

LIBERTARIAN PARTY OF VIRGINIA, et al.

Petitioners,

vs.

EARL DAVIS, et al.

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

JAMES J. FEATHERSTONE *
Santarelli, Choate, Smith,
Kraut & Carroccio
2033 M Street, N.W.
Suite 700
Washington, D.C. 20036
(202) 466-6800

RICHARD E. GARDINER
7404 Estaban Place
Springfield, Virginia 22151

* Counsel of Record

THE COPY CENTER, INC. 615 Chestnut Street Philadelphia, PA 19106 (215) 928-1900

QUESTION PRESENTED

Whether a state ballot access law requiring presidential elector petitions to include the signatures of at least 200 qualified voters for each of all ten congressional districts in the state violates the First and Fourteenth Amendments.

TABLE OF CONTENTS

	Page
Question Presented.....	i
Table of Authorities.....	iii
Opinions Below.....	1
Jurisdiction.....	1
Constitutional Provisions.....	1
Statutory Provision.....	2
Statement of the Case.....	2
(1) Statutory Scheme.....	2
(2) Parties.....	5
(3) Proceedings Below.....	8
Reasons For Granting The Petition.....	9

Page

I. The Court of Appeals' Decision Failed To Comply With Anderson v. Celebrezze, 460 U.S. 780 (1983)..... 9

II. The Court of Appeals' Decision Is In Conflict With The Eleventh Circuit's Decision In Bergland v. Harris, 767 F.2d 1551 (11th Cir. 1985)..... 24

III. The Court of Appeals Erred In Relying Upon The Summary Affirmance In Udall v. Bowen, 419 F. Supp. 746, (S.D. Ind. 1976), aff'd mem., 425 U.S. 947 (1976) Which Does Not Resolve The Question In This Case..... 26

IV. §24.1-159 Devastated The Libertarian Party..... 33

Conclusion..... 35

TABLE OF AUTHORITIES

	Page
Cases:	
Anderson v. Celebrezze, 460 U.S. 780 (1983).....	passim
Bergland v. Harris, 767 F.2d 1551 (11th Cir. 1985).....	24, 25, 26, 34
Clements v. Flashing, 457 U.S. 957 (1982).....	15
Communist Party v. State Board of Elections, 518 F.2d 517 (7th Cir. 1975).....	29
Gray v. Sanders, 372 U.S. 368 (1963).....	19
Hall v. Simcox, 766 F.2d 1171 (7th Cir. 1985), petition for cert. denied, Dec. 2, 1985 (No. 85-589).....	34
Illinois Elections Board v. Socialist Workers Party, 440 U.S. 173 (1979).....	12, 32
Jenness v. Fortson, 403 U.S. 431 (1971).....	16, 17
Lubin v. Panish, 415 U.S. 709 (1974).....	9
Libertarian Party v. Bond, 764 F.2d 538 (8th Cir. 1985).....	13, 22, 34
Libertarian Party of Florida v. State of Florida, 710 F.2d 790 (11th Cir. 1983).....	34

Page

Libertarian Party of Nebraska v. Beerman, 598 F. Supp. 57 (D. Neb. 1984)..... 22

Libertarian Party of Virginia v. Davis, 591 F.Supp. 1561 (E.D. Va. 1984)..... 1

Libertarian Party of Virginia v. Davis, 766 F.2d 865 (4th Cir. 1985)..... passim

Mandel v. Bradley, 432 U.S. 173 (1977)..... 21

Moore v. Ogilivie, 394 U.S. 814 (1969)..... 18, 19, 21, 29

Reynolds v. Sims, 377 U.S. 533 (1964)..... 21

Socialist Workers Party v. Secretary of the State of Washington, 765 F.2d 1417 (9th Cir. 1985), petition for cert. filed, Oct. 15, 1985 (No. 85-656)..... 34

Storer v. Brown, 415 U.S. 724 (1974)..... 21

Udall v. Bowen, 419 F.Supp. 746 (S.D. Ind. 1976), aff'd mem., 425 U.S. 947 (1976)..... 13, 26, 27, 30 31, 33

Williams v. Rhodes, 393 U.S. 23 (1968)..... 21

U.S. Constitution:

First Amendment..... passim

Fourteenth Amendment..... passim

Page

Statutes:

42 U.S.C. 1983..... 8

§115.314, RS Mo. 1978..... 4

§115.321, RS Mo. 1980..... 22

§655:42, N.H. Rev. Stat. Ann. (1981)..... 4

§32-428.10(2), Neb. Rev. Stat. (Supp. 1981)..... 22

Ch:17, §6-142, N.Y. (Elec. Law) (McK. 1978)..... 4

§163-96(2), N.C. Gen. Stat. (1976 & Supp. 1983)..... 4

§35.13.257, Ohio Rev. Code Ann. (1983)..... 22

§24.1-1, Code of Virginia..... 3

§24.1-159, Code of Virginia (1985)..... passim

Other Authorities:

Frampton, "Challenging Restrictive Ballot Access Laws on Behalf of the Independent Candidate," 10 N.Y.U.L. Rev. L.& Soc. Change, 131 (1981)..... 34

Note, "Developments in the Law, Elections," 88 Harv. L.R. 1111 (1975)..... 13

"Supreme Court, 1982 Term," 97 Harv. L.R. 70 (1983)..... 34

Page

Statistics of the Presidential and Congressional Election

November 7, 1972 (U.S.G.P.O. 1973)..... 6, 16

November 2, 1976 (U.S.G.P.O. 1977)..... 6, 16

November 4, 1980 (U.S.G.P.O. 1981)..... 6, 16

November 6, 1984 (U.S.G.P.O. 1985)..... 6, 16

OPINIONS BELOW

The panel opinion of the Court of Appeals (App. A) is reported at 766 F.2d 865 (4th Cir. 1985).* The District Court opinion (App. B) is reported at 591 F.Supp. 1561 (E.D.Va. 1984).

JURISDICTION

Judgment of the Court of Appeals was entered on July 8, 1985. A timely petition for rehearing en banc was denied on August 8, 1985. A timely application for an extension of time to file this petition was granted by the Chief Justice on November 6, 1985 extending until December 6, 1985 the time to file this petition. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISIONS

The First Amendment provides, in

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*/ All of the Parties are listed on the cover page of the panel opinion, p. 1A.

part: "Congress shall make no law. . .abridging. . .the right of the people peaceably to assemble...." The Fourteenth Amendment provides, in part: "nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATUTORY PROVISION

§24.1-159, Code of Virginia (1985) is reproduced in full in Appendix C.

STATEMENT OF THE CASE

(1) Statutory Scheme

In 1982, the Virginia General Assembly amended §24.1-159, Code of Virginia, (Ch. 650, Acts of Assembly of 1982) to require that any group of qualified voters, equal in number to at least one-half of one percent of the number of voters registered in the Commonwealth as of January 1, which does

not constitute a political party,[1] may have the names of electors selected by them printed upon the official ballot to be used in the election of electors for President and Vice President, if the petition so requesting includes the signatures and residence addresses of at least 200 qualified voters from each of the ten congressional districts in the Commonwealth (the "distribution requirement").[2] §24.1-159 also requires that

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[1] Political party is defined in §24.1-1, Code of Virginia, to mean an organization or affiliation of citizens of the Commonwealth which, at the last preceding statewide general election, polled at least ten percent of the total vote cast for the office filled in that election and which has a State Central Committee and a duly elected chairman which have continually been in existence and holding office for the six months preceding the filing of a nominee.

[2] In addition to Virginia, four states have some form of signature distribution requirement:

State/ Statutory Citation	Distribution Requirement

(Footnote continued)

all signatures on the petition be witnessed by a qualified voter of the same congressional district as the voter signing the petition and that the qualified voter witnessing the signature attach to the petition an affidavit that

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Missouri/ RS Mo. 1978 §115.314	1% of last gubernatorial vote in each congressional district or 2% in each of one-half of the state's nine congressional districts
New Hampshire/ N.H. Rev. Stat. Ann. 655:42 (1981)	1,500 signatures in each of the state's two congressional districts
New York/ N.Y. (Elec. Law) Ch:17 §6-142 (McK. 1978)	100 signatures from each of one-half of the state's 34 congressional districts
North Carolina/ N.C. Gen. Stat. 163-96(2) (1976 & Supp. 1983)	200 signatures from four of the state's 11 congressional districts

Clearly, the Virginia distribution requirement is the most burdensome of the five statutes since it does not provide for any alternative to obtaining signatures in all 10 congressional districts as do New York, North Carolina, and Missouri, and by not limiting dilution as in New Hampshire by virture of having only two districts.

he witnessed such signatures (the "witness requirement").

(2) Parties

Petitioners in this case include the Libertarian Party of Virginia, (hereinafter the "Party"), an organization of citizens of the Commonwealth whose purposes are: to nominate and support candidates for federal, state, and local elected offices throughout the Commonwealth who espouse the political principles of the Libertarian Party,[3/]

3/ The national Libertarian Party was formed in Colorado in 1971. Since that time, until the election of 1984, the national Libertarian Party has shown steadily accelerating growth in ballot listings and voter support.

Presidential Election Year	State Ballot Listings	Popular Votes
1972*	3	2,691
1976**	31	171,627
1980***	50	920,049
1984****	40	227,204

Clearly, the ballot access burdens, and (Footnote continued)

to bring to the attention of the public the political principles of the Libertarian Party, to publicize and comment upon issues of importance to the Party and its adherents, and to have the names of electors, pledged to the candidacy of the candidates for President and Vice-President of the national Libertarian Party, printed upon the official ballot to be used in the election of such electors.[4/] Petitioner Party, which has

litigation resulting therefrom, were major factors in the national Libertarian's Party's precipitous decline in 1984.

Sources:

* Statistics of the Presidential and Congressional Election, (hereinafter ("Statistics") of November 7, 1972, p. 52, (U.S.G.P.O. 1973);

** Statistics of November 2, 1976, p. 56, (U.S.G.P.O. 1977);

*** Statistics of November 4, 1980, p. 72, (U.S.G.P.O. 1981);and

**** Statistics of November 6, 1984, p. 69 (U.S.G.P.O. 1985).

[4/] Due to the burden imposed by the distribution requirement added in 1982, while the (Footnote continued)

been in existence since 1980, has a constitution and bylaws, holds an annual convention and has a State Central Committee composed of registered voters from each congressional district of the Commonwealth which meets on a regular basis, and has a duly designated chairman and a secretary who have been in office for over six months. The remaining Petitioners are three qualified voters[5/] who wished to have the names of the electors who would have cast their votes for the Libertarian Party presidential and vice-presidential candidates printed upon the official ballot so that such electors could cast their votes for

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Party succeeded in placing the names of electors pledged to its candidates on the ballot in 1976 and 1980, it was unable to have the names of electors pledged to its candidates placed on the ballot in 1984.

5/ Marguerite Wagner, Dallas Cooley, and Henry Thrasher.

the Libertarian Party presidential and vice-presidential candidates, and three candidates for election[6/] who wished to have their names printed upon the official ballot to be used in the election of electors for President and Vice-President.

(3) Proceedings Below

The Plaintiffs in the District Court (Petitioners herein), seeking to have the distribution and witness requirements added in 1982 declared to be in violation of the First and Fourteenth Amendments to the U.S. Constitution, filed an action, on July 26, 1984, for declaratory and injunctive relief, pursuant to 42 U.S.C. 1983, against the members of the State Board of Elections. On August 20, 1984, before

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6/ Scott Bowden, Jim Elwood, and Alvin Anders.

any discovery, the State Board filed a Motion to Dismiss or in the Alternative for Summary Judgment. Treating the State Board's motion as a Motion to Dismiss, the District Court granted the motion on September 6, 1984, finding the contested provisions of §24.1-159 to be constitutional. The Court of Appeals for the Fourth Circuit affirmed the District Court on July 8, 1985.[7/]

REASONS FOR GRANTING THE PETITION

I. THE COURT OF APPEALS DECISION FAILED TO COMPLY WITH ANDERSON V. CELEBREZZE, 460 U.S. 780 (1983).

In Lubin v. Panish, 415 U.S. 709, 716 (1974), this Court made clear that all ballot restrictions, by their very

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7/ Inexplicably, the Court of Appeals cited only the prior version of §24.1-159, Code of Virginia (1980) which, of course, did not include the distribution and witnessing requirements added in 1982. See, Libertarian Party of Virginia v. Davis, 766 F.2d at 866, n.1.

nature, burden constitutional rights:

> The freedom to associate as a political party, a right we have recognized as fundamental...(citation omitted) has diminished practical value if the party can be kept off the ballot. Access restrictions also implicate the right to vote because, absent recourse to referendums, "voters can assert their preferences only through candidates or parties or both."

This point was reiterated in Anderson v. Celebrezze, 460 U.S. 780, 787 (1983):

> The right to vote is "heavily burdened" if that vote may be cast only for major-party candidates at a time when other parties or other candidates are "clamoring for a place on the ballot." (Emphasis added).

In this case, the Party indisputably alleged that its access to the ballot has been unduly burdened by §24.1-159, thereby diminishing its members' fundamental rights to associate as a political group and to vote for the candidates of their choice. It also

alleged that voters in one congressional district, comprising one-tenth of the population of the Commonwealth, have the absolute power, contrary to the wishes of the voters who reside within the congressional districts comprising nine-tenths of Virginia's population, to exclude the Party from the ballot. The Party, therefore, demonstrated that there is a burden on its constitutionally guaranteed rights.

Under the decisions of this Court, when such vital interests are burdened, a state must establish, by identifying the "precise interests" (Anderson v. Celebrezze, 460 U.S. at 780, 789) which justify the burden imposed, that its ballot access restrictions are necessary to serve a compelling state interest and that it has adopted the least drastic

means to achieve its ends.8/

The State in this case, however, despite the fact that the Party has met its burden and in direct contravention of this Court's teaching in Anderson, has not even attempted to present a

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8/ This Court has long recognized the important role of third parties and independent candidates in American politics. "Abolitionists, Progressives, and Populists have undeniably had influence, if not always electoral success. As the records of such parties demonstrate, an election campaign is a means of disseminating ideas as well as attaining political office." Illinois Elections Board v. Socialists Workers Party, et al., 440 U.S. 173, 186 (1979). See also, Anderson, 460 U.S. at 792, n. 13, regarding the App. to the Brief for American Civil Liberties Union as amicus curiae. In that App. to its Brief, at p. 2a, the ACLU stated:

> "(I)t is, nevertheless, the case that throughout our history, third parties and independent candidates have emerged repeatedly to dissent from the dominant parties' ideologies, to serve as a systemic safety valve for the discontented, and to provide a means of giving voice to valid proposals for change — proposals that, with remarkable frequency, have ultimately found their way into the platforms of the major political parties."

The Party clearly meets these criteria for recognition.

constitutionally sufficient justification for its restrictive ballot access requirements.[9] Thus, although the Court of Appeals stated that the distri-

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[9] The Court of Appeals repeatedly noted what it termed the "indulgent" nature of the Virginia ballot access scheme. See e.g., 766 F.2d at 869. The basis for the Court of Appeals' description appears to have been its comparisons of the Virginia scheme with other states' schemes in litigated cases such as Udall v. Bowen, 419 F. Supp. 746 (S.D. Ind. 1976), aff'd mem., 425 U.S. 947 (1976), Libertarian Party v. Bond, 764 F.2d 538 (8th Cir. 1985) and a ten year old law review compendium of such statutes. 766 F.2d at 868, citing, "Note, Developments in the Law, Elections," 88 Harv. L. Rev., 1111, 1124, n. 11 (1975). Neither of these sources for comparison is particularly valid for two reasons. First, the "better" state ballot access requirements have not been the subject of litigation. Second, since 1975 — the date of the cited law review — over half the states have revised their ballot access laws. See, Alabama (1982), Alaska (1984), Arizona (1979), Arkansas (A.G. Opinion 79-102, 1979), California (1976), Colorado (1975), Delaware (1976), Georgia (1979), Idaho (1985), Indiana (1980), Kansas (1984), Louisiana (1976), Maine (1977), Maryland, (1984), Nebraska (1978), New Hampshire (1981), New Mexico (1981), North Carolina (1983), North Dakota (1985), Oklahoma (1985), South Dakota (1975), Tennessee (1976), Vermont (1978), Washington (1977), Wisconsin (1977), and Wyoming (1984).

bution requirement "advances important state interests" (766 F.2d at 868) and "also promotes important state interests" (766 F.2d at 868), it did not identify those interests in the manner called for by Anderson in that it did not do so precisely and did not explain the importance of those interests. For example, there have been three presidential elections -- 1972, 1976 and 1980 -- between the time of the initial enactment of §24.1-159 and the addition to it in 1982 of the distribution requirement. It is to those three elections which reference must be had if the State is the bear its burden of demonstrating that there was a compelling state interest in 1982 to add the distribution requirement. Notably, however, from 1972 until 1980, under the original "1/2 of 1%" requirement of

§24.1-159 -- without the added distribution burden -- there were never more than six parties or independent slates of presidential electors on the Virginia ballot, surely not "an overcrowded ballot." Clements v. Fashing, 457 U.S. 957, 965 (1982). In 1984, however, there were only three such slates: the two major parties, an independent, and no third parties such as Petitioners.[10/]

10/ The slates from 1972 to 1984, which the Court of Appeals did not even consider, were as follows:

Election Year	For Presidential Electors	Total
1972*	Democratic Republican American Socialist Labor	4
1976**	Democratic Republican Independent Libertarian Socialist Workers U.S. Labor	6

(Footnote continued)

Rather than identifying and examining the precise interests of the State, the Court of Appeals spoke only of the general interests associated with statutes dealing with the number of signatures required for ballot access, without attempting to associate those

1980***	Democratic Republican Independent Independent (Citizens)	4
1984****	Democratic Republican Independent	3

Sources:

* Statistics of the Presidential and Congressional Election (hereinafter ("Statistics") of November 7, 1972, p. 45, (U.S.G.P.O. 1973);

** Statistics of November 2, 1976, p. 49 (U.S.G.P.O. 1977);

*** Statistics of November 4, 1980, p. 63 (U.S.G.P.O. 1981);

**** Statistics of November 6, 1984, p. 60 (U.S.G.P.O. 1985).

interests with a distribution requirement. Like the State, the Court of Appeals cited Jenness v. Fortson, 403 U.S. 431, in support of a proposition which is not at issue in this case, that is, that the State, to protect against frivolous or fraudulent candidacies, may impose an overall signature requirement[11/] or a deadline for filing petitions. Moreover, in concluding that §24.1-159 "does not unfairly and unnecessarily burden the availability of political opportunity" (766 F.2d at 868), the Court of Appeals acknowledged that §24.1-159 does, in fact, impose a burden, but did not apply the "precise

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11/ The Court of Appeals was correct, however, in not claiming, as did the State, that Jenness v. Fortson held that a state could require a showing of statewide support before a slate of electors could be printed on the ballot in a general election; Jenness only required "a significant modicum of support. . . ." 403 U.S. at 442.

interest" test to determine whether the burden is justified.[12/] Absent the application of that test, the Court of Appeals was in no position to conclude that "the distribution requirement is both reasonable and nondiscriminatory...." 766 F.2d at 869.[13/]

The Court of Appeals, moreover, in its discussion of Moore v. Ogilivie, 394 U.S. 814 (1969), did not identify a precise state interest to justify

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12/ Notably, no decision of this Court has established that the appropriate test of the constitutional validity of a ballot access statute is whether it "unfairly and unnecessarily" burdened the availability of political opportunity.

13/ The Court of Appeals also failed to take account of this Court's sensitivity, in passing upon the validity of state statutes regulating access of minor parties to the ballot in presidential elections, to the fact that "the State has a less important interest in regulating presidential elections than statewide or local elections, because the outcome of the former will be largely determined by voters beyond the state's boundaries." Anderson, 460 U.S. at 795.

Virginia's distribution requirement despite the fact that it emphasized the difference between the counties of widely differing populations involved in Moore and the congressional districts of equal size involved in the instant case. While it is true that Moore v. Ogilive invalidated a distribution requirement where the counties were of unequal size, it did not approve distribution requirements involving congressional districts of equal size. Indeed, Moore actually supports the position of the Party.

In Moore, this Court described the controversy as being in the federal-state area where its "one-man, one vote" decisions have thrust, 394 U.S. at 816, and quoted from Gray v. Sanders, 372 U.S. 368, 379 (1963):

> Once the geographical unit for which a representative is to be

> chosen is designated, all who participate in the election are to have an equal vote -- whatever their race, whatever their sex, whatever their occupation, whatever their income, and whereever their home may be in that geographical unit. This is required by the Equal Protection Clause of the Fourteenth Amendment. (emphasis added). 394 U.S. at 817.

In a presidential election, the "geographical unit" is the entire state.[14/] Accordingly, because it allows voters in one congressional district to eliminate totally the vote of other voters in the other nine congressional districts, §24.1-159 denies voters within a geographical area comprising nine-tenths of Virginia's population "an equal vote." Plainly, such a result is improper, particularly

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[14/] The winner of a presidential election is determined by who receives the majority of votes throughout the state, not by who receives a majority of votes in a majority of congressional districts.

in light of this Court's observation in Moore v. Ogilvie, quoting Reynolds v. Sims, 377 U.S. 533, 555 (1964), that:

> [t]he right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise. 394 U.S. at 818.

Finally, while the Court of Appeals prefaced its review of §24.1-159 by referring to the contested statute "when viewed in full," it nevertheless proceeded to truncate its examination by completely ignoring one of the benchmarks of ballot access -- the opportunity for "write-in" votes. 766 F.2d at 868. This abbreviated examination is not consistent with this Court's case law.[15/] The fact is that

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15/ See e.g., Mandel v. Bradley, 432 U.S. 173, 178 (1977); Storer v. Brown, 415 U.S. 724, 738-39 (1974); and Williams v. Rhodes, 393 U.S. 23, 34 (1968).

Virginia does not permit "write-ins" whereas the other states statutes chiefly relied upon by the Court of Appeals all have "write-in" provisions.16/ Moreover, as this Court noted in Anderson in regard to "write-in" votes, "even this opportunity is not an adequate substitute for having the candidate's name appear on the ballot." 460 U.S. at 799, n. 26.

The rights of Party members have also been diminished by the unduly and unnecessarily burdensome witness requirement since it requires the constant presence of a registered voter from each of the 10 congressional

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16/ See e.g., Ohio Rev. Code Ann. §35.13.257 (1983) (as noted in Anderson, 460 U.S. at 799); Missouri Rev. Stat. §115.321 (1980) (as noted in Libertarian Party v. Bond, 764 F.2d at 542-3) and Nebraska Rev. Stat. 32 -428.10(2) (Supp. 1981),(see e.g., Libertarian Party of Nebraska v. Beerman, 598 F.Supp. above).

districts to witness all of the 200 signatures in that particular district. Since the voter registration rolls are used to validate the signatures in any event, no compelling state interest can be provided for the requirement of such witnessing. If, arguendo, the purpose of the witness requirement is merely prophylactic, surely the same purpose is served by the less restrictive alternative of requiring a witness who is merely required to be a resident in the state, thereby significantly easing the burden on the Party.

Thus, when truly "viewed in full", Virginia's statute -- in light of its distribution requirement, the lack of "write-ins," and its witnessing provision -- is hardly as "indulgent" as it was characterized by the Court of

Appeals.

Since this Court has never given plenary consideration to a distribution requirement of the type present in Virginia and has not had an opportunity to develop the analytic process established in Anderson for use in resolving constitutional challenges to state laws restricting access to the ballot in federal elections, it should grant a Petition for a Writ of Certiorari in this case.

II. THE COURT OF APPEALS DECISION IS IN DIRECT CONFLICT WITH THE ELEVENTH CIRCUIT'S DECISION IN BERGLAND V. HARRIS, 767 F.2d 1551 (11TH CIR. 1985)

In contrast to the Fourth Circuit, the Court of Appeals for the Eleventh Circuit held, properly applying this Court's mandate in Anderson, that when the state, in a ballot access case, moves to dismiss a complaint, the state

"must introduce evidence to justify both the interests the State asserts and the burdens the State imposes on those seeking ballot access." (emphasis added). Bergland v. Harris, 767 F.2d 1551, 1555 (11th Cir. 1985). Notably, in Bergland, the state, unlike the state in the instant case, even went so far as to file affidavits setting forth its "administrative interests" in its ballot access scheme. Even those, however, the Eleventh Circuit found too insufficient to comply with Anderson. Consequently, the Eleventh Circuit remanded the case to the district court, requiring it to make findings of fact concerning the burden imposed and requiring the district court to "weigh the precise interests advanced by the State...." (emphasis added) 767 F.2d at 1555. Here, however, the Fourth Circuit did

not require the district court to do either.

The Fourth Circuit's decision here and the Eleventh Circuit's decision in Bergland, clearly evidence a confusion in the lower courts regarding the import of this Court's prior decision in Anderson and the analytic process to be followed in resolving constitutional challenges to state law restricting ballot access in federal elections. The Petitioners therefore respectfully urge this Court to grant their Petition for this reason as well.

III. THE COURT OF APPEALS ERRED IN RELYING UPON THE SUMMARY AFFIRMANCE IN UDALL V. BOWEN, 419 F. SUPP. 746 (S.D. IND 1976) AFF'D MEM., 425 U.S. 947 (1976), WHICH DOES NOT RESOLVE THE QUESTION IN THIS CASE

It is not an adequate substitute for application of Anderson's "precise interest" test for the Court of Appeals

to rely upon this Court's summary affirmance in Udall v. Bowen, 419 F.Supp. 746 (S.D. Ind. 1976), aff'd mem., 425 U.S. 947 (1976) in holding that §24.1-159 is constitutionally valid.

Udall v. Bowen was an action to declare unconstitutional and enjoin a provision of the Indiana Code, I.C. 1971, 3-1-9-19, which required a candidate who wished his name placed on the Indiana presidential preferential primary ballot to submit to the Indiana Secretary of State by at least 50 days before the date of the primary election, a petition, and counterparts thereof, bearing the signatures of at least 5,500 registered Indiana voters. The statute also required a minimum of 500 signatures of registered voters from each of Indiana's eleven congressional districts. Udall was required to file his

petition bearing the requisite number of signatures by twelve o'clock noon, March 15, 1976.

Before the filing deadline, Udall complied with the statute by obtaining counterparts of his petition signed by 500 or more registered voters in each congressional district. Udall's agents, however, delayed filing until the last minute and then neglected to file one counterpart containing the signatures of approximately 100 voters registered in the Sixth Congressional District. As a result, the counterparts timely filed from such Sixth District contained only 465 names and the Secretary of State properly refused to certify Udall as a candidate. The three judge panel which heard the case in the district court stated:

> Irrespective of the merits of the constitutional argument, it

> is therefore apparent that the real reason why Udall was not routinely certified as a candidate on March 15, 1976, is his own failure to file a counterpart which was available to him. (emphasis added) 419 F. Supp. at 748.

The three judge court distinguished Moore v. Ogilvie, 394 U.S. 814 (1969) and Communist Party v. State Board of Elections, 518 F.2d 517 (7th Cir. 1975), cases relied on by Udall, by stating that they held invalid Illinois statutes which, by requiring a specified number of signatures from counties of unequal population, effectively gave greater weight to the signatures of voters in relatively less populous counties. The three judge court then said:

> Because the eleven congressional districts in Indiana are substantially equal in population, the ballot access scheme prescribed by I.C. 1971-3-1-9-19, avoids the equal protection objections of the cases cited. 419 F. Supp. at 749.

The three judge court then went on to stress that delegates to the national convention are not selected in the presidential preference primary election at issue but are selected by party convention and have a duty to support the candidate receiving the highest statewide primary vote for one ballot only in the national convention. The three judge court thus concluded:

> Therefore, since splinter candidates have no chance, as a practical matter, of winning delegate votes by running in the primary, the minimal regulation imposed by the statute is reasonable in degree, protects valid state interests, and is constitutional. (emphasis added) 419 F. Supp. at 749.

From the above, it can be seen that Udall's negligence in failing to file what was available to him influenced the three judge court's consideration of the case, thereby detracting from his

constitutional arguments.

Of greater importance in distinguishing Udall's case from the instant case, however, is the fact that the "election" considered in Udall was a primary, not a general election, and was not even to select delegates to the national convention. The present case, on the other hand, involves access to the general election ballot, not in an essentially meaningless primary, which cannot even be properly classified as an election, but in the national general election in which the President and Vice President of the United States are chosen. Accordingly, even if Udall were read as approving a statewide geographic distribution requirement for ballot access petitions in a party preference primary involving congressional districts of substantially equal popu-

lation, the case has no precedential value in determining the issue now before this Court.

Moreover, as this Court emphasized in Illinois Elections Board, supra:

> [S]ummary affirmances have considerably less precedential value than an opinion on the merits. See Edelman v. Jordan, 415 U.S. 651, 671 (1974). As Mr. Chief Justice Burger observed in Fusari v. Steinberg, 419 U.S. 379, 392 (1975) (concurring opinion), "upon fuller consideration of an issue under plenary review, the Court has not hesitated to discard a rule which a line of summary affirmances may appear to have established." 440 U.S. at 180.

Here, of course, there is not even under consideration a "line of summary affirmances" but one decision involving facts which are, as previously explained, completely distinguishable from the instant case. In this connection, Illinois Elections Board also stated:

> As we stated in Mandel v. Bradley, 432 U.S. 173, 176 (1977), the precedential effect of a summary affirmance can extend no farther than "the precise issues presented and necessarily decided by those actions." A summary disposition affirms only the judgment of the court below, ibid, quoting Fusari v. Steinberg, supra, at 391-392 (Burger, C.J. concurring), and no more may be read into our action than was essential to sustain that judgment. 440 U.S. at 182-83.

To clarify the meaning of the summary affirmance in Udall and thereby eliminate confusion in the lower courts about its application, this Court should grant a Petition for a Writ of Certiorari in this case.

IV. §24.1-159 DEVASTATED THE LIBERTARIAN PARTY

The effect of the Virginia distribution requirement, as well as other states' new ballot access laws, was to force the Party, and other third parties, to litigate repeatedly for ballot

access across the country.[17] Litigation, rather than voter education, communication, and persuasion thus become the order of the day for these minor parties. This litigation is another demonstration of the burdens that the states have placed on this constitutionally protected activity.[18] Thus, it was the time and expense of litigation to gain ballot access that "cost" the Party its participation in the elec-

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[17] See e.g., Bergland v. Harris, 767 F.2d 1551 (11th Cir. 1985); Libertarian Party v. Bond, 764 F.2d 538 (8th Cir. 1985); Libertarian Party of Florida v. State of Florida, 710 F.2d 790 (11th Cir. 1983). See also Socialist Workers Party v. Secretary of State of Washington, 765 F.2d 1417 (9th Cir. 1985), petition for cert. filed, October 15, 1985, (No. 85-656), and Hall v. Simcox, 766 F.2d 1171 (7th Cir. 1985), petition for cert. denied, Dec. 2, 1985 (No. 85-589).

[18] Leading commentators have noted the resource-draining effect of ballot access litigation. See e.g., "The Supreme Court, 1982 Term", 97 Harv. L.R. 70, 157 (1983) citing Frampton, "Challenging Restrictive Ballot Access Laws on Behalf of the Independent Candidate", 10 N.Y.U. L. Rev. L & Soc. Change, 131, 133 (1981).

tion of 1984. Such litigation will presumably affect the Party's ability to participate in future elections if a Virginia-style distribution requirement is adopted elsewhere, as is likely should the Court of Appeals decision not be reversed.[19/]

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

19/ According to its Report filed with the Federal Election Commission, the Party raised $414,905 for its 1984 campaign. Of that amount, $103,077, or almost 25 percent, was spent just on ballot access. Even this amount understates the impact of the ballot access litigation, since much of the legal research and advocacy for the Party is done by volunteer attorneys — many of whom are themselves members of the Party.

Respectfully submitted,

James J. Featherstone*
Santarelli, Choate,
Smith, Kraut &
Carroccio
2033 M Street, N.W.
Suite 700
Washington, D.C. 20036

Richard E. Gardiner
7404 Estaban Place
Springfield, Virginia
22151

Counsel for Petitioners

*Counsel of Record

Counsel gratefully acknowledge the assistance of J. Benedict Centifanti, Law Clerk, in the preparation of this Petition.

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

NO. 84-2071

Libertarian Party of Virginia; Marguerite Wagner; Dallas Cooley, M.D.; Henry Thrasher; Scott Bowden; Jim Elwood; Alvin Anders,

Appellants,

versus

Earl Davis, Chairman State Board of Elections; A. George Cook, 3rd Vice Chairman, State Board of Elections; Susan Fitz-Hugh, Secretary State, Board of Elections,

Appellees.

Appeal from the United States District Court for the Eastern District of Virginia, at Richmond. D. Dortch Warriner, District Judge. (CA 84-0437-R).

Argued: May 8, 1985
Decided: July 8, 1985

Before RUSSELL and SPROUSE, Circuit Judges, and KRAPP, Senior United States District Judge, for the Southern District of West Virginia, sitting by designation.

James J. Featherstone (Santarelli & Bond; Richard E. Gardiner on brief) for Appellants; William J. Bridge, Assistant Attorney General (Gerald L. Baliles, Attorney General on brief) for Appellees.

SPROUSE, Circuit Judge:

Under Virginia election laws, a political organization not qualifying as a "political party" must petition to secure a place on the Virginia ballot for its presidential and vice-presidential nominees. The petition must be signed by one-half of one percent of all registered voters, including at least two hundred voters from each congressional district, and each signature must be witnessed and attested by a qualified voter from the same congressional district as the petition signer.[1] The

[1] Va. Code §24.1-159 (1980) provides in pertinent part:

> §24.1-159. How other groups may submit names of electors. — Any group of qualified voters of not less than the number equal to one half of one per centum of the qualified voters in the Commonwealth as of the first day of January of that year, not constituting a political party as defined in §24.1-1, may have the names

(Footnote continued)

Libertarian Party of Virginia appeals from the district court's Fed. R. Civ. P. 12(b)(6) dismissal of its action challenging the constitutionality of this provision. We affirm.

The Libertarian Party, which has been in existence since 1980, does not constitute a "political party" because

> of electors selected by them, including one elector residing in each congressional district and two from the Commonwealth at large, printed upon the official ballot to be used in the election of electors for President and Vice-President by filing a petition so requesting with the State Board of Elections not later than noon of the sixtieth day before said election. Said petition, which shall be signed by said voters, contain their residence addresses, the signatures to which shall be witnessed by a qualified voter whose affidavit to that effect is attached to said petition, shall set forth the names of the electors selected by such voters, the party name under which they desire the electors so selected to be listed on the ballot, and the names of the candidates for President and Vice-President for whom such electors are expected to vote in the Electoral College.

it did not poll 10% of the vote in the immediately preceding statewide election as required by the state statutory definition.[2] Consequently, access to the ballot for electors of the Party was limited to the avenue provided by §24.1-159. In its section 1983[3] declaratory and injunctive action against the Virginia State Board of Elections (Board) the Libertarian Party asserts

[2] Va Code. §24.1-1 (1980) defines a "political party" as:

> an organization or affiliation of citizens of the Commonwealth which, at the last preceding statewide general election, polled at least ten percent of the total vote cast for the office filled in that election by the voters of the Commonwealth at large. Such organization or affiliation of citizens shall also have a State central committee and a duly elected chairman which have continually been in existence and holding office for the six months preceding the filing of a nominee.

[3] 42 U.S.C. §1983 (1982).

that the requirements of §24.1-159 violate rights protected by the first and fourteenth Amendments to the United States Constitution. The Libertarian Party below and on appeal attacked the provisions requiring (1) that the petition include the signatures of at least 200 qualified voters from each congressional district (the distribution requirement), and (2) that the signatures be witnessed and attested by a qualified voter from the same congressional district as the qualified voter signing the petition (the witness requirement). In other words, its principal argument is that requiring petition signatures to be witnessed and obtained distributively trangresses constitutional boundaries recently established in this first and fourteenth amendment area. We disagree and affirm

the action of the district court.

It is abundantly clear that we must ensure that ballot access restrictions do not infringe two fundamental constitutional rights -- the right to associate for the advancement of political beliefs and the right of qualified voters to cast their votes effectively. Illinois State Board of Elections v. Socialist Workers Party, 440 U.S. 173, 184 (1979). As the Supreme Court has announced with equal clarity, however, elections properly must be regulated "if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes." Storer v. Brown, 415 U.S. 724, 730 (1974).

This creates an obvious tension which the Supreme Court has

recognized. In Anderson v. Celebrezze, 460 U.S. 780 (1983), the Court articulated a balancing test to resolve challenges to a state's ballot access requirements:

> [A] court must resolve such a challenge by an analytical process that parallels its work in ordinary litigation. It must first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate. It then must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule. In passing judgment, the Court must not only determine the legitimacy and strength of each of those interests; it also must consider the extent to which those interests make it necessary to burden the plaintiff's rights. Only after weighing all these factors is the reviewing court in a position to decide whether the challenged provision is constitutional.

460 U.S. at 789.[4/]

Applying the Anderson test to the

Party's challenge to the distribution requirement of §24.1-159, the balance weighs significantly in favor of Virginia's right to regulate access to its ballot in this limited manner. In terms of pure numbers, 0.5% of the qualified voters, the statute requires only a nominal demonstration of support in order to place a candidate's name on the ballot. The requirement is one of the least burdensome in the nation. See generally Note, Developments in the Law -- Elections, 88 Harv. L. Rev. 1111, 1124 n. 11 (1975). The Party argues, however, that the requirement that a political organization submit a petition

4/ The Court also has declared that in reviewing statutes that impose signature requirements as a prerequisite to placement on a state's ballot, the focal point of our inquiry is whether a "reasonably diligent. . .candidate [can] be expected to satisfy the signature requirements." Storer v. Brown, 415 U.S. 724, 742 (1974).

including the signatures of at least 200 qualified voters from each of Virginia's ten congressional districts results in unconstitutional vote dilution and cannot be justified by any legitimate state interests. While the Supreme Court has recognized that a state may not implement an electoral scheme that debases or dilutes the weight of a citizen's vote, Moore v. Ogilvie, 394 U.S. 814, 818 (1969), in our view the distribution requirement of §24.1-159 does not possess such impact and moreover advances important state interests.

In the first place, Virginia law requires that congressional districts be apportioned in such a way as to contain, as nearly as practicable, an equal number of inhabitants. Wilkins v. Davis, 205 Va. 803, 139 S.E.2d 849 (1965). We are thus not faced with a statutory

scheme based on unequal voter apportionment such as those which have come under close constitutional scrutiny. See, e.g., Moore v. Ogilvie, 394 U.S. 814 (1969) (overturning Illinois scheme requiring signatures of 200 voters from each of at least 50 counties where evidence showed that 93.4% of voters resided in 49 most populous counties while 6.6% resided in remaining 53 counties); Blomquist v. Thomson, 739 F.2d 525 (10th Cir. 1984) (striking down Wyoming requirement that new political party submit signatures of 8,000 voters, the majority of whom did not reside in same county, on grounds that requirement discriminated against residents in more populated counties); Communist Party v. State Board of Elections, 518 F.2d 517 (7th Cir.), cert. denied, 423 U.S. 986 (1975) (Illinois statute requiring

25,000 voter signatures, not more than 13,000 of which from any one county, held invalid as unconstitutionally diluting voting power of citizens residing in populous counties), Libertarian Party of Nebraska v. Beerman, 598 F. Supp. 57 (D. Neb. 1984) (state statute requiring signatures from each county held unconstitutional). Va. Code §24.1-159, in stark contrast to the enactments considered in the above decisions, operates evenhandedly and does not allow voters from one district to control access to the state's ballot.

The Virginia statute also promotes important state interests. The requirement that a political organization or candidate exhibit a "significant modicum of support" before being granted a place on the state's ballot serves the legitimate state interest of avoiding "confu-

sion, deception, and even frustration of the democratic process at the general election." Jenness v. Fortson, 403 U.S. 431, 442 (1971). Moreover, the states "have important interests in protecting the integrity of their political processes from frivolous or fraudulent candidacies, in ensuring that their election processes are efficient, in avoiding voter confusion caused by an overcrowded ballot, and in avoiding the expense and burden of run-off elections." Clements v. Fashing, 457 U.S. 957, 965 (1982). Section 24.1-159, when viewed in full, comports with these state concerns and does not unfairly or unnecessarily burden "the availability of political opportunity." Anderson v. Celebrezze, supra, at 793. As noted, the requirement of a petition signed by 0.5% of eligible voters is a minimal impedi-

ment. Moreover, Virginia imposes no disaffiliation requirement on those voters who sign petitions, nor does the state demand that those voters actually vote for Libertarian Party candidates in the general election. The deadline for filing petitions, sixty days before the election, is among the most generous in the nation. See, Anderson v. Celebrezze, 460 U.S. 780, 795 n. 20 (1983). The time alloted to procure signatures, eight months in this case, substantially exceeds periods previously held permissible. See, Jenness v. Fortson, 403 U.S. at 433 (180 days); Storer v. Brown, 415 U.S. at 739-40 (24 days); American Party of Texas v. White, 415 U.S. 767, 786 (55 days).

Although not determinative, it is significant that the Virginia statutory scheme compares favorably with other

similar state statutory designs examined both before and after Anderson. In Udall v. Brown, 419 F. Supp. 746 (S.D. Ind.), aff'd mem 425 U.S. 947 (1976), the district court upheld an Illinois statute requiring candidates who desired to appear on the state's presidential preference primary ballot to submit petitions bearing the signatures of at least 5,500 registered voters, with a minimum of 500 signatures from each of the state's eleven congressional districts. The district court concluded that "the minimal regulation imposed by the statute is reasonable in degree, protects valid state interests, and is constitutional." 419 F. Supp. at 749.

In Libertarian Party v. Bond, 596 F. Supp. 719 (E.D. Mo. 1984), the district court was confronted with a Missouri statute that conditioned ballot

access on either submitting signatures from each congressional district totalling 1% of the total votes cast in the state's last general gubernatorial election or from one-half of the congressional districts equal to 2% of the total votes cast in the state's last gubernatorial election. As a practical matter, the statute required tht the Libertarian Party procure between 4,266 and 5,348 signatures from each of five congressional districts in order to comply with the 2% requirement. Rejecting the contention that the reasoning in Udall was not controlling because Missouri required five times as many signatures as did Indiana, the court held that "the principle remains that geographical signature prerequisites are not a constitutional bar in ballot qualification cases." 596 F.Supp. at

724.[5]

In view of the indulgent nature of Virginia's ballot access scheme, the distribution requirement is both reasonable and nondiscriminatory and is justified by the recognized state interest in protecting the electoral process from the undue burden posed by frivolous candidates and insincere ballot cluttering. Anderson v. Celebrezze, supra at 788.

The Party next attacks the witness

[5] In Libertarian Party of Nebraska v. Beerman, 598 F.Supp. 57 (D. Neb. 1984), Judge Van Pelt noted:

> It appears to this Court that the most equitable means of assuring that the petitioning candidate or party demonstrate the ncessary evidence of statewide support without unduly burdening such party would be to require that the petitions be signed by a percent of the voters in each congressional district.

598 F.Supp. at 63.

portion of §24.1-159. This provision dictates that each signature on the petition be witnessed and attested by a qualified voter from the same congressional district as the petition signer. The Party contends that the witness requirement violates first amendment rights by unduly burdening the right to associate and does not serve compelling state interests. We disagree.

Virginia's interest in preventing election fraud by assuring the genuineness of signatures as a basis for imposing a notarization requirement for citizens signing a bond referendum was recognized in Howlette v. City of Richmond, 485 F.Supp. 17 (E.D. Va.), aff'd, 580 F.2d 704 (1978). We find Judge Merhige's reasoning there to be equally compelling in this case. See

also Libertarian Party of Nebraska v. Beerman, 598 F.Supp. 57, 60 (D. Neb. 1984); Johnson v. Cuomo, 595 F.Supp. 1126, 1130 (N.D.N.Y. 1984). We also agree with the district court's rationale in the instant case that the requirement that the witness be from the same congressional district as the petition signer serves the important purpose of assuring "some indication of geographic as well as numerical support" by demonstrating "that within each congressional district there is at least one 'activist' sufficiently motivated to shoulder the burden of witnessing signatures." Libertarian Party of Virginia v. Davis, 591 F.Supp. at 1564. It is difficult to imagine how the state could accomplish these objectives by less restrictive means. The statute does not limit the number of signatures that an

individual may witness nor does it require that witnesses be members of the Libertarian Party.

For the foregoing reasons, the decision of the district court is affirmed.

AFFIRMED.

APPENDIX B

IN THE UNITED STATES
DISTRICT COURT
FOR THE EASTERN DISTRICT
OF VIRGINIA
RICHMOND DIVISION

Civil Action No. 84-0437-R

LIBERTARIAN PARTY OF VIRGINIA, et al.)
)
v.)
EARL DAVIS, et al.)

OPINION

Plaintiffs filed a complaint for declaratory and injunctive relief advancing the view that the application of Va. Code §24.1-159 to their attempt to list Libertarian Party electors on the November presidential ballot violates plaintiffs' rights under the First and Fourteenth Amendments to the United States Constitution.

Plaintiffs consist of the Libertarian Party of Virginia and certain of its officers and adherents. They com-

plain that the cited Code section violates their rights insofar as it requires at least 200 qualified voters from each congressional district in the Commonwealth to petition to have the names of Libertarian Party electors for president and vice president printed upon the official ballot to be used in the November presidential election. Plaintiffs also complain that their First and Fourteenth Amendment rights are infringed in that the 200 signatures must be witnessed by a qualified voter of the same congressional district as the qualified voter signing the petition.

The statute in question with the offending passages underlined is as follows:

> Any group of qualified voters, equal in number to at least one-half of one percent of the number of voters registered in

the Commonwealth as of January 1 of that year and including at least 200 qualfied voters from each congressional district in the Commonwealth, not constituting a political party as defined in §24.1-1, may have the names of electors selected by them, including one elector residing in each congressional district and two from the Commonwealth at large, printed upon the official ballot to be used in the election of electors for President and Vice-President by filing a petition so requesting with the State Board of Elections not later than noon of the seventy-fourth day before said election. Said petition, which shall be signed by said voters after January 1 of the year in which the election is held and contain their residence addresses, the signatures to which shall be witnessed by a qualified voter of the same congressional district whose affidavit to that effect is attached to said petition, shall set forth the names of the electors selected by such voters, the party name under which they desire the electors so selected to be listed on the ballot, and the names of the candidates for President and Vice-President for whom such electors are expected to vote in the Electoral College. Substitution of a different candidate for Vice-President

maybe made by the candidate for President before the State Board of Elections certifies to the county and city electoral boards the form of official ballot. In order to utilize a selected party name on the ballot, such group shall have had a state central committee composed of registered voters from each congressional district of the Commonwealth, a party plan and bylaws, and a duly designated chairman and secretary in existence and holding office for at least six months prior to filing the petition. The State Board of Elections may require proof that such group meets these requirements before permitting use of a party name on the ballot. Such party name shall not be identical with or substantially similar to the name of any political party qualifying under §24.1-1 and then in existence.

In the event that a group of qualified voters meets the requirements set forth herein except that they cannot utilize a party name, the electors selected and the candidates for President and Vice-President shall be identified as "Independent." (Emphasis added).

The quoted statute affects plaintiffs because plaintiffs do not consti-

tute a "political party" as defined in §24.1-1 of the Code of Virginia.[1/] Not being a "political party," access to the ballot for electors of the Libertarian Party must be obtained via §24.1-159.

Defendants, being members of the State Board of Elections, filed a motion to dismiss or in the alternative for summary judgment on August 20, 1984. The motion was accompanied by an appropriate brief to which plaintiffs have failed to respond within the time per-

[1/] "Party" or "political party" shall mean an organization or affiliation of citizens of the Commonwealth which, at the last preceding statewide general election, polled at least ten percent of the total vote cast for the office filled in that election by the voters of the Commonwealth at large. Such organization or affiliation of citizens shall also have a state central committee and a duly elected chairman which have continually been in existence and holding office for the six months preceding the filing of a nominee;

Plaintiffs allege that their Party did not poll the requisite 10% of the vote in the immediately preceding statewide election.

mitted by Local Rule 11(F). Treating the motion as a motion to dismiss, it will be GRANTED.

It must initially be borne in mind that the conduct of elections, both State and federal, was generally reserved to the States in the United States Constitution. See, e.g., U.S. Const. art. I, §2, cl. 1; id. art. I, §4, cl. 1; id. art. II, §1, cl. 2; id. amend. X; id. amend XVII. Through congressional enactions and judicial decisions over the years, this reserved power has been seriously eroded. Nevertheless, it is the beginning point of an inquiry into the constitutionality of a State's election scheme.

It also must readily be acknowleged that States and their citizenry have a responsibility to see to it that elections are fairly, efficiently, and

honestly conducted so that the will of the people can be expressed through the electoral process. The rules established by States to this end should not be invalidated by a judge merely because they place burdens upon some person or group seeking a place upon the ballot. Free and untrammeled listing on the ballot would create chaotic elections and would result in meaningless results at the polls. States have an interest in presenting the citizenry with ballots between contestants who have at least a semblance of a chance at winning. While political campaigns have a time-honored and valuable office in providing dissident, splinter, and nascent political groups an opportunity to air their views, the essential purpose of an election is to elect public officials.

Without sensible rules precluding access, serious candidates for office enjoying substantial political support would find themselves awash in a sea of publicity-seekers, egotists, political weirdos, rich dilettantes, and assorted nuts with negligible or no public backing. To keep such off the ballot is not to deprive them of their First Amendment rights. It merely is to reserve the ballot for the serious purpose it is intended to serve.

The Libertarian Party of Virginia appears to be a serious political party with a definite program which has attracted widespread, though thin, support throughout the country. Nevertheless, its access to the ballot is regulated under the statutes not by its seriousness nor by its program or platform. Access is limited by "content

neutral" numerical and geographic requirements which are applicable alike to all political groups, other than "political parties"[2] which have demonstrated substantial public acceptance.

With this preamble, I will turn to the case law dealing with plaintiffs' complaint. Jenness v. Fortson, 403 U.S. 431 (1971) predated the candidacy of John Anderson[3] but on the basis of the research I have done its holding and reasoning has never been questioned or overruled. I believe it still states the law applicable to this complaint. Fortson counseled that States should not imposed "suffocating restrictions," 403 U.S. at 438, on those who seek to be

[2] See n.1.

[3] From my recollection of newspaper reports Anderson was extraordinarily successful in persuading judges to list his electors on the ballot.